

**MISSOURI DEPARTMENT OF NATURAL RESOURCES  
LAND RECLAMATION COMMISSION**

In the Matter of:	)	
	)	
AA QUARRY LLC	)	
AA Quarry Site # 2462	)	
Johnson County, Missouri,	)	
New Site Permit Application	)	
	)	
DAVID EARLS, et al,	)	Proceeding Under
	)	The Land Reclamation Act
Petitioners Pro Se,	)	§§ 444.760 - 444.789, RSMo
	)	
v.	)	Permit #1094
	)	
DEPT. OF NATURAL RESOURCES,	)	
KEVIN MOHAMMADI, Staff Director,	)	
Land Reclamation Program,	)	
Division of Environmental Quality,	)	
	)	
Respondent,	)	
	)	
AA QUARRY LLC,	)	
	)	
Applicant.	)	

**APPLICANT'S ANSWER (BRIEF)  
IN OPPOSITION TO  
PETITIONERS' PETITION (BRIEF)**

COMES NOW AA Quarry LLC ("Applicant") and for its answer/brief in response to  
Petitioners' petition/brief states as follows:

I. BACKGROUND FACTS

Robert and Thomas Radmacher are the principal owners of Radmacher Brothers  
Excavating Co., Inc., a Missouri corporation with its principal office and place of business  
located in Pleasant Hill, Missouri ("RadBro"). RadBro engages in the business of earth

excavation, earth and rock moving, and road and bridge building. RadBro contracts with various public owners, including the Missouri Department of Transportation, the City of Kansas City, Missouri and various other political subdivisions in the State of Missouri. The company was formed in the year 1990 and has operated continuously in the construction business to this day.

In addition to RadBro, Robert and Thomas Radmacher are the principal owners of Radmacher Land and Equipment Management Company, LLC, a Missouri limited liability company formed in the year 2004, also with its principal office and place of business located in Pleasant Hill, Missouri (hereafter "RLE"). RLE engages in the business of equipment acquisition and ownership for use by RadBro in construction projects and also land purchasers for long term investment and use as borrow sites for materials necessary in RadBro's business.

In January 2011, RLE purchased the 520-acre site located on AA Highway in Johnson County, Missouri, which is the subject of this permit dispute. Shortly thereafter, in August of 2011, RadBro conducted subsurface geotechnical surveys in order to determine the presence of limestone minerals on the tract for possible borrow site use by Radmacher for base materials in road construction projects in the vicinity of Jackson and Johnson County, Missouri.

In the first half of 2012, RadBro moved some existing broken limestone rock on the project site to remediate ravines located on the property. The prior owner of the property had broken up some rock and stockpiled it on the site. RadBro also broke up rock with a hoe ram for the same purpose.

RadBro believed that as a result of conducting this work on site with the hoe ram, a complaint was made to the Department of Natural Resources on June 12, 2012, by one or more persons living in the vicinity of the site. The complaint was that surface mining operations were being conducted. On June 19, 2012, an inspection was conducted by the Department of Natural

Resources ("DNR"), Larry Slechta, Land Reclamation Program. The Land Reclamation Program concluded that limestone rock on the site was not being sold commercially; but instead was being used for farm purposes and/or personal use of the owner of the property and that no land reclamation permit was needed by RLE to perform such work.

However, Robert and Thomas Radmacher believed that if they intended to secure limestone rock on the site for use on the site and as a source of borrow materials for RadBro, they should obtain a "General Operating Permit" for land disturbance from the DNR Water Pollution Control Program (10 CSR 20-6.010(1)(2)).

Therefore, on July 6, 2012, RadBro applied for and received a "General Operating Permit" under the Missouri Clean Water Law and the Federal Water Pollution Control Act. The permit was obtained on line through the DNR ePermitting Certification and Signature Document. Permit No. MOR A O1538 was issued for the "Radmacher Brothers Borrow Site." The permit allowed RadBro to engage in "construction or land disturbance activity" (eg., clearing, grubbing, excavating, grading, and other activities . . . ) together with storm water control measures. A storm water pollution prevention plan (SWPPP) was to be provided.

Simultaneous with the issuance of this permit, RadBro furnished an SWPPP dated July 6, 2012 for an estimated construction period of August 30, 2012 through December 31, 2015, noting that the project site was designated for the purpose of "borrow materials" for RadBro's business, and that land disturbance would be allowed for construction of temporary exits, staging areas, grading, stockpiling, excavation and final grading. The total projected disturbed land was identified as 9.15 acres near the center of the 520-acre site.

RadBro proceeded to work under this Land Disturbance Permit utilizing some of the rock for site improvements and for a RadBro project for the City of Kansas City, Missouri on Choteau Trafficway.

Shortly thereafter, in the month of July 2012, RadBro determined to explore the possibility of opening a commercial quarry to allow the "crushing and sizing" of rock for RadBro projects and for commercial sale of crushed rock to other parties.

On July 20, 2012, Tom and Robert Radmacher prepared Articles of Organization for AA Quarry, LLC, a Missouri limited liability company (LC 1243292). The principal office and place of business of AA Quarry, LLC is also in Pleasant Hill, Missouri. The AA Quarry "Operating Agreement" of July 20, 2012, provides that the company was organized ". . . to engage in the mining of rock and manufacturing of gravel and related products. . . ."

Originally, Robert Radmacher sought to hire a consultant with knowledge of the various DNR programs and permit requirements to assist with a turnkey project placing the quarry into operation by obtaining all necessary state, federal and local permits. However, no such consultant could be located and retained. Therefore, Robert Radmacher and Brian Yeager (an engineer employed by RadBro) contacted representatives of the DNR Land Reclamation Program to inquire about the process for obtaining a land reclamation permit to conduct quarry operations and engage in the sale of crushed and sized minerals. Initially, they spoke to Tucker Frederickson, Environmental Specialist III, for the DNR Land Reclamation Program. Mr. Frederickson was helpful and provided assistance in locating and understanding DNR requirements and procedures for obtaining a land reclamation permit from the Land Reclamation Commission.

Further action by AA Quarry in this regard resulted in a November 16, 2012 application for land reclamation permit (Permit Application for Industrial Mineral Mines under 10 CSR 40-10.020(1)). The initial application required amendment and the final application was mailed to the DNR Land Reclamation Program on or about December 4, 2012.

On December 11, 2012, the DNR Land Reclamation Program (Tucker Frederickson) advised AA Quarry by letter that:

1. The AA Quarry application was complete;
2. Under 10 CSR 40-10.020(2)(H) AA Quarry was required to advertise notice of intent to operate a surface mine in a local newspaper authorized for legal publications; and
3. AA Quarry should send certified mail notices to: (a) contiguous or adjacent landowners and (b) county officials in the county in which the mine was to be located.

Initially there was a question as to the requirement for certified mail notices to contiguous and adjacent landowners. RadBro contacted the DNR Land Reclamation Program. On December 17, 2012, Robert Radmacher confirmed with Tucker Frederickson of the DNR that because the AA Quarry mine plan area utilized a 100-foot setback from the boundary lines of the 520-acre site for mining operation limits, the certified mail notice to contiguous or adjacent landowners was not necessary; but that the newspaper notice and mail notice to county officials still was required.

AA Quarry then proceeded to satisfy the notice requirements set forth in the regulations and provided evidence to the DNR by submitting an affidavit of publication in a local newspaper and certified mail return receipt regarding the letter sent to the governing authority in Johnson County, Missouri.

Prior to submission of the application for land reclamation permit, AA Quarry commenced additional land improvements on the site in early November 2012. Specifically, AA Quarry commenced construction of a dam, settling pond, haul road, laydown yard, reinforced berms and rock check dams for general site improvement. The construction work principally was intended to preserve terrain, manage vegetation, manage runoff and supply water to cattle on the site, as well as a potential sedimentation basin and water source which might also serve the proposed quarry operation in the future.

This on-site work apparently generated yet another complaint by Petitioners, or other related persons, to the DNR on November 19, 2012. The complaint asserted water pollution environmental concerns and an accusation that the site was being used "for commercial purposes."

DNR Water Pollution Control Program conducted an investigation on November 20, 2012, by Patrick Peltz, Environmental Specialist. He concluded that the Radmacher Brothers Borrow Site was in compliance with its July 6, 2012 Missouri State Operating Permit (MSOP MORA 01538), the Missouri Clean Water Law, and the Clean Water Commission Regulations. Mr. Peltz found no evidence that material was being mined and hauled off site for commercial purposes. Another routine site inspection occurred on November 28, 2012, and all of the SWPPP documents were examined. All required records were made available and found to be up to date.

On December 14, 2012, Andrea Collier, PE, Regional Director of the Kansas City Regional Office of DNR Water Pollution Control Program, sent a letter to Robert Radmacher for the Radmacher Brothers Borrow Site addressing the above conclusions and that Radmacher Brothers still was required to apply for and obtain an MOG 49 MSOP permit from the water

program before starting commercial quarry operations. At this time there was no discussion between RadBro and DNR regarding the need for any additional or expanded land disturbance permits necessary for the dam and pond construction work or other permits that might be required by other agencies.

In keeping with progressing the quarry operations permit application, AA Quarry took the next step on December 19, 2012, and submitted its "Application for Authority to Construct" to the Missouri DNR Air Pollution Control Program (Susan Heckenkamp, Construction Permits Office of DNR). AA Quarry requested voluntary limitation on facility admissions to below the "de minimis level" (a De Minimis Permit).

After review of the air application by DNR Air Pollution Control Program, Kyra L. Moore, Director, forwarded a letter dated January 17, 2013, to Robert Radmacher of AA Quarry approving construction activities for a new open pit quarry; but advising AA Quarry to wait for issuance of its permit before commencing quarry operations.

(Several months later, on July 22, 2013, Susan Heckenkamp, New Source Review Unit Chief of the Air Pollution Control Program of DNR, forwarded a letter to Robert Radmacher for AA Quarry enclosing Missouri Department of Natural Resources Air Conservation Commission "Permit to Construct" (No. 072 013-014).)

Progressing the Land Reclamation Permit Application, DNR Land Reclamation Program Director Kevin Mohammadi advised AA Quarry on January 22, 2013 by certified letter that after the public notices had been given regarding the permit application, DNR had received letters from the public regarding requests for a public meeting. He inquired if AA Quarry would agree to a public meeting being held. AA Quarry so agreed.

Also, on January 30, 2013, the DNR Regional Director of the Water Pollution Control Program, Andrea Collier, P.E., sent a letter to RadBro enclosing a public notice for the proposed "Missouri State Operating Permit to Discharge", directing RadBro (AA Quarry) to post the public notice on a bulletin board at its place of business. A draft of the "Missouri Operating Permit" (General Permit MOG 49 1251) was attached to the letter. This was the additional permit that Ms. Collier had referred to in her letter of December 14, 2012 when advising regarding the outcome of the November 19, 2012 complaint.

Thereafter, AA Quarry proceeded to a public hearing on March 7, 2013. The narrative summary of that hearing and the expression of public concerns is contained in a summary document prepared by the DNR and submitted to the Land Reclamation Commission.

Shortly after the public hearing on March 7, Jimmy Coles of the Water Pollution Control Program orally advised AA Quarry that it should obtain a second land disturbance permit for the dam pond construction area which was outside the original 9.15 acre boundary. Therefore, on or about March 13, 2013, RadBro applied to the DNR Clean Water Commission for a second land disturbance permit (Missouri State Operating Permit, General Operating Permit No. MORA 02837). This permit also allowed for construction and land disturbance activities at the site and was issued effective March 13, 2013, again through the ePermitting system.

On April 2, 2013, Kevin Mohammadi from the Land Reclamation Program staff submitted his memorandum to the Land Reclamation Commission with his recommendation for the AA Quarry Land Reclamation Commission permit for 214 acres of the 520-acre site. Attached to this memorandum was the summary document prepared by DNR regarding the public hearing comments and staff responses. Mr. Mohammadi suggested that due to public concerns the director's recommendation be docketed for the May 23, 2013 Land Reclamation

Commission meeting. On that same date, Tucker Frederickson of the DNR Land Reclamation Program advised Petitioners of their rights to request a public hearing from the Land Reclamation Commission.

Several Petitioners thereafter requested a formal public hearing and on April 30, 2013, Kevin Mohammadi advised that the Land Reclamation Commission would decide whether or not to grant a formal public hearing at the meeting on May 23, 2013.

A number of prospective Petitioners appeared at the May 23, 2013 Land Reclamation Commission meeting, made statements, and after due consideration, the Commission voted to grant Petitioners a formal public hearing.

Thereafter the hearing officer was assigned, issued his first preliminary order providing for these pleadings by Petitioners, Respondent and Applicant to join the issues for the public hearing. On or about August 8, 2013, Petitioners forwarded their brief/pleading setting forth allegations against Respondent and Applicant. Applicant submits the following responses to that document.

## **II. PETITIONERS' CLAIMS OF NON-COMPLIANCE DESIGNED TO DEFEAT PERMIT APPLICATION**

Petitioners cite §444.773 R.S.Mo. (Rights and Duties of Mine Owners §444.760 et seq.) and assert that §444.773.4 provides that the Land Reclamation Commission, after public hearing, may deny an applicant's permit request by examining past acts of non-compliance of the applicant to determine whether certain criteria are met. However, §444.773.4 addresses past non-compliances by existing operators at other locations in the State in the preceding five years, and is not designed to address applications by new applicants without any past history. For example, the provision reads as follows:

"If the Commission finds, based on competent and substantial scientific evidence on the record, that the *operator*<sup>1</sup> has demonstrated, during the five year period immediately preceding the date of the permit application, a pattern of non compliances *at other locations*, in Missouri, that suggests a reasonable likelihood of future acts of non compliance . . . . the Commission may deny the permit."

Clearly, this statutory provision does not relate to a first time applicant like AA Quarry. *See Lincoln County Stone Company, Inc. v. Koenig*, 21 S.W.3d 142 (Mo.App. 2000), stating the statutory requirement that an applicant identify other permits held by the applicant demonstrates a state legislative intent to consider such prior acts of operators (and those affiliated) when issuing a Land Reclamation Commission permit.

The statute goes on to say in considering such operators' past acts that the acts must be coupled with evidence that such acts suggest a nexus between the past acts and a reasonable likelihood of future non-compliances.

"In determining whether a reasonable likelihood of non-compliance will exist in the future, the Commission may look to past acts of non-compliance in Missouri but only to the extent they suggest a reasonable likelihood of future acts of non-compliance."

Again, this part of the statute does not appear to apply to a first time applicant; but instead, is pointed at existing quarry operators applying for additional permits.

The statute also is careful to point out that in suggesting such a nexus that such acts standing alone do not make the case of a reasonable likelihood of future non-compliance and much more is required in the evidence to make that connection. *See Lincoln County Stone Company, Inc. v. Koenig*, supra, noting such acts standing alone are not determinative of the issue.

"Such past acts of non-compliance in Missouri, in and of themselves, are an insufficient basis to suggest a reasonable likelihood of future acts of non-

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<sup>1</sup> "Operator. Any person, firm or corporation engaged in and controlling surface mine operation." 10 C.S.R. 40-10.100 Definitions (19) Operator.

compliance. In addition, such past acts shall not be used as a basis to suggest a reasonable likelihood of future acts of non-compliance unless the non-compliance has caused or has the potential to cause, a risk to human health or to the environment, or has caused or has potential to cause pollution, or was knowingly committed or is defined by the United States Environmental Protection Agency as other than minor."

Again, this statute is pointed at other existing and permitted quarry operations of the Applicant causing potential harm to the environment by operations.

Finally, there is a "present acts" provision of non-compliance in the statute as well. The statute clearly states that if such non-compliances are asserted, they must be developed by multiple non-compliances of environmental laws *administered by the DNR that have resulted in personal or environmental harm*:

"If a hearing petitioner or the Commission demonstrates either present acts of non-compliance or reasonable likelihood that the permit seeker or the operations of associated persons or corporations in Missouri will be in non-compliance in the future, such showing will satisfy the non-compliance requirements of this subsection. In addition, such basis must be developed by multiple non-compliances of any environmental law *administered by the Missouri Department of Natural Resources at any single facility in Missouri that has resulted in harm to the environment or impaired the health, safety and livelihood of persons outside the facility.*"

Again, all of these references clearly indicate the substance of the inquiry relates to DNR related environmental law violations of existing operations of the applicant at other locations in Missouri in the preceding five years resulting in harm to a person or the environment.

The Department of Natural Resources Regulations at Division 40, Chapter 10, Regulation 10 CSR 40-10.080(3)(E)(F), set forth the same standards as identified above for the examination of past and present non-compliances and whether such non-compliances might sustain a ruling denying a permit.

It is patently clear that the entire statutory concept of examining past deeds of an applicant for five years preceding the application at other locations is designed to flesh out a

negative operational history of quarry operators and take that conduct into account in granting or denying additional permits or expanding existing permits.

AA Quarry is a first time Applicant and has no history of "past" non-compliances in quarry operations for five years preceding this application. Moreover, it has not engaged in any "present" noncompliance relating to DNR administered laws that have resulted in personal or environmental harm. Therefore, AA Quarry suggests that §444.773.4 and 10 CSR 40.10.080(3)(E)(F) do not apply. All of the following so-called noncompliances asserted by Petitioners should be dismissed and barred from consideration in the case as a basis for permit application denial.

Nevertheless, Applicant will address Petitioners' complaints of non-compliances as follows.

### **III. PETITIONERS' ALLEGED COMPLAINTS OF NONCOMPLIANCES**

- A. Petitioners assert that the applicant engaged in quarry operations prior to the issuance of a Land Reclamation Commission permit for the site.

Applicant denies this allegation and refers to the fact narrative stated above as to the specific actions, activities and construction work performed by RadBro/AA Quarry on the 520-acre site from the date of original purchase of the property in January 2011 to the date of this response.

Applicant's activities on site were first examined in the early summer of 2012 by the DNR Land Reclamation Program and again in November of 2012 by the DNR Water Pollution Control Program. In neither instance was applicant cited for a non-compliance with any statute or DNR regulation nor advised that its activities were inappropriate in any way relative to the permitting process or under existing laws administered by DNR.

In fact, as to the first instance of complaint in the summer of 2012, the Land Reclamation Program staff concluded that the activities conducted on site were exempt activities under the law.

For example, §444.766(1) provides that no provision of §444.760 - §444.790 R.S.Mo. (the Land Reclamation Act) shall apply to the "excavation" of minerals (defined at §444.765(11)) or fill dirt (defined at §444.765(9)) for the purpose of construction or land improvement as unrelated to the mining of minerals *for a commercial purpose*. The term "commercial purpose" is defined in §444.765(3) as:

". . . extracting minerals for their value in *sales to other persons* or for incorporation into a product."

This is the so-called personal use exemption cited by DNR relative to RadBro's activities in 2012. This exception is also found in 10 CSR 40-10.010(2)(B) which states that

". . . surface mining for industrial minerals may be conducted without a permit by any individual for personal use only."

Further, as part of the exemption language, §444.766(2) provides that no permit is required to "move" minerals or fill dirt within the confines of the real property where excavation occurs. Therefore, the digging and moving of rock and dirt on the site for use on site is exempt from the need for a land reclamation permit.

Also, no permit is required for the purpose of "removing" minerals or fill dirt from the real property as provided in that section, so long as it is not part of a commercial operation. Therefore, the Applicant was free to excavate, move and remove minerals around the site without a land reclamation permit so long as the Applicant was not operating a commercial quarry.

Further guidance is found in §444.766(2)(2) R.S.Mo. which goes one step further and states that mineral excavations for land improvement may be removed from the site to off-site

locations if they are not crushed, screened, or passed through other "beneficiations", defined in §444.765(2) as "dressing or processing of minerals for the regulation of size or product, removing unwanted constituents, and improving the quality and purity of the desired product." In such a case such excavations are not considered quarry operations but are presumed to be for the purpose of land improvement and shall not require a surface mining permit. If on-site minerals are not "processed" they may be used on site and also taken off site; provided however, that the minerals taken off site are not used for commercial purposes (as defined in the statute) and are not taken off the property on a "frequent or on-going" basis.

Therefore, even if Applicant excavated and moved various minerals and dirt around the site and off the site for personal use on a RadBro project, this activity was permitted, so long as it was not done on a "frequent and on-going basis," or for commercial purposes (as defined in the statute) and was done for personal use.

Finally, a land reclamation permit is not required for the excavation of fill dirt, regardless of the site of disposition or whether construction occurs at the site of excavation. §444.766.3. In the end, Applicant was allowed to move rock and dirt for the pond and dam improvements on the farm without a land reclamation permit.

More significantly, if the Land Reclamation Commission Program determined under the law that a surface mining permit is required of an applicant for construction or land improvement on real property, then such determination is to be made by the LRC and sent to the property owner, in writing. §444.760(3)(1) R.S.Mo. No such notice was sent in this case.

However, the concept of mining, crushing, sizing and moving materials off the project for commercial use and beyond the limitations of the statute above prompted Robert and Thomas Radmacher to form AA Quarry and apply to the Land Reclamation Program for a quarry permit.

Clearly, Applicants pre-permit activities on site were permitted by law and did not constitute a non-compliance activity as asserted by Petitioners, *even if* such alleged non-compliance could be considered by the hearing officer and the Commission which Applicant asserts it cannot.

Moreover, in the second instance of Petitioners' complaint regarding land disturbance and alleged quarry operations in the fall of 2012 at the dam pond area (outside of the area covered by Permit #MORA 01538), the DNR Water Pollution Program reviewed the Applicant's activities at that time and found that the Applicant was in compliance with the existing DNR Water Pollution Control Permit of July 6, 2012.

Therefore, the noncompliance alleged here exists only in the minds of the Petitioners; and Petitioners' allegation of the Applicant engaging in commercial quarry operations without a land reclamation permit is unsupported by the facts. This allegation is denied by Applicant.

B. Petitioners assert that the applicant failed to post "signs" identifying the mine area in violation of 10 C.F.R. 40-10.050(11).

Applicant denies this allegation.

First, the regulation cited by petitioner applies to neither an application for a land disturbance permit with the DNR's Water Pollution Control Program nor an application for a land reclamation permit from the Land Reclamation Program.

Instead, 10 C.S.R. 40-10.050, cited by Petitioners, sets forth "Performance Requirements" for the operations of a quarry under an existing permit. The express purpose of the regulation is stated in the regulation. The purpose is for a surface mine "operator" to protect the environment and restore surface mine land . . . by setting standards for "post mining" land use. . . . The term "operator" is defined in §444.760(13) as the entity ". . . engaged in and controlling a surface mine operation." Clearly, an "operator" is not a first time permit applicant.

Second, to reinforce this conclusion all of the subsections of 10 C.S.R. 40-10.050 relate to the operations of a mine, not to applications for a land reclamation permit. For example, the subsections deal with lateral support, erosion control, grading, topsoil handling, revegetation, clean-up, final pit impoundment, reclamation, flood plain issues, etc.

Petitioners have plucked §11 regarding signs from this regulation and attempt to place a permit application burden on Applicant relative to it. However, the section relates to posting a sign identifying the mine area at a primary point of access and maintaining it until release of all surety bonds. The implication is that the section relates to mine operations. §11 has nothing to do with the permit application process for either a land disturbance permit from the Water Pollution Control Program or a land reclamation permit from the Land Reclamation Program.

On the other hand, 10 C.S.R. 40-10.020 does apply to the land reclamation permit application process and required notices. It sets forth the requirements for a prospective surface mine operator to obtain the necessary permit from the Land Reclamation Commission. *See also* §444.772, R.S.Mo. to the same effect.

In 10 C.S.R. 40-10.020(2)(H) and (I) the notice requirements for applicants are set forth. This is where requirements are found to publish notice regarding the application for a surface mine permit in a local newspaper ((2)(H)) and to give notice by certified mail to the local governing body and adjacent landowners (2(I)). There is no requirement for posting signs or written notices on AA Highway or, for that matter, anywhere else.

These sections also are consistent with the DNR Land Reclamation Program written directive to the Applicant dated December 11, 2012, to follow the regulations and comply with the notice provisions set forth in the letter (as clarified later regarding the 100-foot setback rule).

A review of the requirements for an application for a Land Disturbance Permit under the Clean Water Act (as opposed to a land reclamation permit) reflects the lack of any public notice requirement or sign requirement for posting on AA Highway prior to the issuance of a permit. These Land Disturbance Permits are issued by the ePermitting process and there are no "sign posting" requirements found in 10 C.S.R. 20-6, the regulations for DNR Division 20 Clean Water Commission Chapter 6 permits. *See* 10 C.S.R. 20-6.200 Storm Water Regulations setting forth the requirements and process of applications for storm water discharge and the terms and conditions for the permits. In sum, there are no "sign posting" requirements for either the Land Disturbance Permit or a Land Reclamation Permit Application.

Petitioners' second allegation regarding failing to post signs in accordance with regulation is likewise unfounded and unsupported by the facts and, therefore, is denied by the Applicant.

- C. Petitioners assert that Applicant engaged in land disturbance (dam and pond construction) prior to obtaining a second land disturbance permit from the Water Pollution Control Program and also prior to posting required signs.

Applicant denies this allegation.

First, as noted above, there are no statutes or regulations requiring the applicant for a land disturbance permit to post any signage at the site or at any point available to the public as part of the application process, including on AA Highway.

Second, Petitioners complain regarding Applicant's construction of the dam/pond beginning in early November 2012 and substantially completed in May of 2013. However, as set forth in the narrative above, the DNR Water Pollution Control Program responded to this November 2012 complaint on site and found that the Applicant was "in compliance" with the existing permit. There was no indication at that time of any violation of the permit or that any further land disturbance permits were required from the Water Pollution Control Program for

continuation of the work. This is consistent with Petitioners' statement in their brief that someone contacted DNR regarding the situation with the dam and pond and was told by DNR that it was farm land improvement not regulated by DNR and it did not require a permit. (It is unclear whether Petitioners contacted someone in the Land Reclamation Program or in the Water Pollution Control Program regarding this complaint.)

Nevertheless, and regardless of the above, Jimmy Coles of the DNR Water Pollution Control Program orally advised the Applicant on March 8, 2013, that a second land disturbance permit was needed for the dam/pond area construction if used for commercial quarry purposes.<sup>2</sup> Therefore, Applicant on March 13, 2013, applied for, paid the fee, and obtained such permit by the on-line ePermitting service (Permit #MORA 02837 for 104.77 acres).

No citation of noncompliance was issued by the DNR nor a notice of violation of any statute or regulation, nor was any other negative action taken against Applicant by the DNR as related to this complaint of Petitioners. Instead, the permit was issued for the additional acreage and construction proceeded.

While 10 C.S.R. 20-6 (Clean Water Commission Regulations) does not address enforcement activities for the Clean Water Commission, 10 C.S.R. 40-10 for the Land Reclamation Commission does in 10 C.S.R. 40-10.070 "Enforcement." Applicant suggests that this regulation provides insight into DNR's approach where a party may act without a permit and one is required. The regulation provides that where surface mining activities are conducted without a land reclamation permit, the DNR proceeds as follows:

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<sup>2</sup> While 10 C.S.R. 20-6-.200 "Storm Water Regulations", Subparagraph (1)(B)(5) excepts *farmlands* from storm water permit regulations, generally; Subparagraph (1)(B) also provides that DNR may take action to require a permit under the Clean Water law if any *excepted operations* might cause pollution of state waters or violate the Clean Water law or DNR regulations. In effect, the DNR may trump the regulation if it believes a permit is necessary for otherwise excepted activity.

(A) First, it provides a written notice to the Applicant operator identified in the violation.

(B) Second, DNR identifies the remedial action required.

(C) Third, it allows a reasonable time for abatement of the violation; and

(D) Further, DNR will terminate the notice of violation if all abatement means are taken.

Likewise, with respect to land disturbance permits, the Missouri Clean Water Act (Chapter 644, "Water Pollution", and particularly, §644.051.1 and .2) permits the director to investigate any violations of §644.006 through §644.141, R.S.Mo., and any regulations, orders or rules thereunder and, if a violation exists, the director may by "conference, consultation, or persuasion," endeavor to eliminate the violation. The terms "conference", "consultation", and "persuasion" are defined in §644.016(3) and mean that the Department and the violator are to negotiate in good faith to eliminate the alleged violation and attempt to agree on a plan to achieve compliance. Applicant believes this statute would apply to the second land disturbance permit issue (if one was required in the first instance), and the facts reflect that the DNR and the Applicant followed the law in this regard.

The above statutory and regulatory scheme indicates the DNR's attitude toward statutory and regulatory compliance which is one of taking remedial action, not punitive action. If a second or expanded acreage land disturbance permit was required by law for the Applicant's dam/pond work in late 2012, the Applicant was not aware of that fact in November of 2012. When orally notified by the DNR later to remedy the situation and come into compliance, the Applicant did so immediately by ePermitting a second land disturbance permit. Since no notice of a violation was issued of record, none needed to be terminated. There was no indication of any damage or harm to the environment or that the Applicant knowingly avoided securing the

second land disturbance permit. This issue cannot qualify as the type of noncompliance set forth in the regulation. Any alleged failure to obtain a second land disturbance permit at the dam/pond area was not viewed by the DNR staff as a "hanging offense"; but instead only an issue in need of a resolution.

Applicant suggests that even if §444.773.4 and 10 C.S.R. 40-10.080 3(e) and (f) apply here, the facts do not suggest an alleged noncompliance for which there is a logical nexus between obtaining the second permit and a reasonable likelihood that the Applicant will be in noncompliance in the future or that has resulted in harm to persons or the environment. Applicant simply was unaware in late 2012 that a second land disturbance permit was necessary, particularly in light of the November 2012 inspection of the dam/pond construction work by the DNR Water Pollution Control Program and the issuance of the compliance letter of December 14, 2012.

D. Petitioners assert Applicant was issued a Federal Clean Water Act Noncompliance.

Applicant admits the issuance of a "noncompliance" by the Corps of Engineers but denies this allegation is a noncompliance that may support a permit denial.

Approximately one month after the DNR Water Pollution Control Program reviewed Applicant's site work at the dam and pond area, Petitioners again were lodging complaints. In January of 2013 Applicant received a telephone call from a Corps of Engineers representative stating that a complaint had been made that Applicant was "dumping fill into the waters of the United States" at the dam/pond construction area.

Obviously, Petitioners were not satisfied with the DNR determination in mid-December of 2012 that Applicant's construction activities at the dam/pond area were in compliance with DNR's land disturbance permit under the Missouri Clean Water Act. Robert Radmacher

immediately telephoned Bill Zeamon of the DNR Land Reclamation Program and advised of his telephone call with the Corps of Engineers representative.

Thereafter, on or about March 5, 2013, Michael T. McFadden, Regional Project Manager of the Kansas City Corps of Engineers office, reviewed Applicant's construction activities at the dam and pond area and determined that Applicant was in noncompliance with General Condition 31 of the Nationwide Permit requiring a pre-construction notification to the Corps of Engineers district office before the start of construction activities. Applicant was asked to stop work and did so. The Corps of Engineers provided Applicant with a jurisdictional determination map to identify the potential resources to be protected under the Clean Water Act. The Corps of Engineers advised that the project could be brought into compliance by Applicant by submitting a pre-construction notification and a permit application to the district office regarding both the work already completed and any work planned in the future.

Approximately a month later on April 2, 2013, David R. Hibbs, Regulatory Program Manager in the Operational Division of the U.S. Department of the Corps of Engineers Kansas City District, issued to Applicant the official written "Notice of Noncompliance" with Permit No. NWK2013-00247 for the Applicant's project work asserting that the dam/pond work was located in the head waters of "several unnamed tributaries" to the south fork of the Blackwater River, located above Echo Lake.

Previous to the January 2013 complaint and follow up notice by the Corps of Engineers, Robert Radmacher had investigated the need for a Corps of Engineers 404 permit on site. Initially he did not believe one was required (*see* July 6, 2012 Land Disturbance Permit ePermitting certificate and signature document where Robert Radmacher answered "No" to the question of whether waters of the United States would be disturbed and a 404 permit needed).

This conclusion was confirmed by Robert Radmacher's review of the EPA web site page titled "Guidance to Identify Waters Protected by the Clean Water Act", last updated March 6, 2012. The web page states that the United States Environmental Protection Agency and the United States Army Corps of Engineers developed the draft guidelines for determining whether a waterway, water body, or wetland is protected by the federal Clean Water Act.

These guidelines sprung out of the Supreme Court opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006). In that case the United States Supreme Court in a 4-1-4 decision initially clarified the terms "waters of the United States" to state that they included only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams . . . oceans, rivers . . . and lakes. . . ." This definition seems clear from a layman's standpoint. However, true to form in U.S. Supreme Court opinions nothing is left "clear". An additional opinion in *Rapanos* also defined waters of the United States as those with a "significant nexus" to navigable waters, now leaving the door open for interpretation of the term "significant nexus." What initially seemed clear as to identification of the waters of the United States now became cloudy. The opinion also stated that a significant nexus exists where a wetland or water body, either by itself or in combination with other similar sites, significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway. (For information, the Eighth Circuit follows the rule that either of the two Supreme Court definitions will be applied to define waters of the United States but other Circuits are split.)

Nevertheless, in an effort to clarify the *Rapanos* opinion, the web page was developed to help the public understand the requirements. The web page states that many agricultural and roadside ditches are not covered by the Federal Clean Water Act and that *artificial* lakes or

*ponds*<sup>3</sup> created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins or rice grading are not covered by the Clean Water Act. Moreover, erosional features such as gullies and rills and swales and ditches that are not *tributaries* or wetlands of U.S. waters are not covered. Therefore, the issue was whether or not the ditches, gullies and swales behind the dam and settling pond qualified as "tributaries of protected waters of the United States."

Mr. Radmacher believed that the dam and pond which would back water up into the dry erosional features on the farm were not covered by the Federal Clean Water Act; and, therefore, no 404 permit was required. However, the Corps of Engineers had a different view of the "significant nexus" of the ditches and gullies to U.S. navigable waters. The Corps of Engineers opinion was that these dry gullies were unnamed "tributaries" of U.S. waters.

Regardless, rather than contest or dispute the issue with the Corps of Engineers, Applicant concluded to comply with the 404 requirements. The very next day after Mr. McFadden made his site visit on March 5, 2013, Applicant wrote a letter to Mr. McFadden stating that Applicant was authorizing Nathan Hamm, P.E., Vice President Program Manager for SCS Aqua Terra to prepare Applicant's 404 application to bring the project into compliance. Applicant also hired Jim Feagons to perform the associated historical study needed for the permit.

Within two days after receiving Mr. Hibbs' April 2, 2013 letter of the official notice of noncompliance, Applicant sent a letter dated April 4, 2013 to the Corps of Engineers confirming Applicant's intent to bring the project into compliance with all permit requirements.

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<sup>3</sup> See also DNR web site "How to Obtain Quarry Permits" (Publication 2404) page 4, regarding 404 permits stating the following are not considered Waters of the United States: "*Artificial lakes or ponds.*"

By April 19, 2013, Applicant had a draft permit application under 404 prepared in anticipation of an April 22, 2013 meeting with the Corps of Engineers to review the application. After review and discussion with the Corps of Engineers a final application was submitted on June 6, 2013. That application is currently pending with the Corps of Engineers and awaiting review of the results of the historical study by Mr. Feagons which was submitted to the Corps on September 5, 2013. At present Applicant is not aware of any issues, defects or deficiencies in the 404 permit application or any objections by the Corps of Engineers that might prevent issuance of the permit.

While Applicant acknowledges commencement of the construction at the dam and pond area where the Corps of Engineers has designated the dry ditch-like erosional features as waters of the United States, Applicant denies commencement of the work without the permit was done intentionally or to avoid the permitting process or to hide any facts from the DNR or the Corps of Engineers. Mr. Radmacher immediately notified the DNR Land Reclamation Program after first learning of the issue; and when applying for the second land disturbance permit of March 13, 2013, Applicant this time advised the Water Pollution Control Program in the ePermitting certification that a 404 permit was required for the dam/pond work.

Applicant suggests that:

(a) The 404 permit issue facts do not suggest a reasonable likelihood of future acts of noncompliance in the operation of the quarry.

(b) This particular activity was not within five years prior to the application submission.

(c) §444.773.4 R.S.Mo. and 40-10.080(3)(e) and (3)(f) do not apply here.

(d) The particular alleged "present act" of noncompliance in dispute is not administered by the DNR, but instead is under the jurisdiction of the Corps of Engineers (*see* 10 C.S.R. 40-10.080(3)(f) requirement for DNR administration); and

(e) The violation did not result in harm to the environment or any individual. *See* §444.773.4, R.S.Mo. There were no citations issued by the EPA, the DNR or the Corps of Engineers and there are none of record.

Again, this issue relates to bringing the entire project into compliance for all government authorities in conjunction with issuance of a Land Reclamation Permit and beginning operations; but does not constitute a prior violation of any statute or regulation administered by the DNR within five years prior to the application.

E. Petitioners assert that Applicant modified the dam without a DNR permit from Dam Safety Program (Missouri Dam and Reservoir Safety Program).

Applicant denies this allegation.

As stated above, Applicant began construction of the dam in early November 2012. DNR Water Pollution Control Program was involved in a review of that work area in November of 2012 and satisfied itself, at least at that time with respect to its area of authority. A significant portion of the dam work, including the dam itself, was substantially completed by March/April of 2013.

The Corps of Engineers became involved in the dam/pond construction in January and then again in early March/April of 2013 due to the 404 permit issue. As described, Applicant hired SCS Aqua Terra to assist in the permit application.

In the course of drafting the 404 permit application prior to April 19, 2013, Aqua Terra measured the dam height. The draft application has attached to it several "figures" or drawings showing the site location (figure 1), site layout (figure 2), and dam topography (figure 3). Figure 3 reflects a profile of the dam and dam height with elevations and contour lines. The figures are all dated April 19, 2013.

The narrative portion of the draft application describes the earlier project work and activities (already completed) and particularly the dam, in paragraph 18 of the application:

*... the construction of a rock checks dam ... with approximate length of 650 feet, bottom width of approximately 150 feet, top width of approximately 40 feet, and overall height of approximately 30 feet ... and average top elevation of approximately 905 feet ... and ... outlet pipe has a flow line elevation of 881 feet ..."*

The final permit application of June 6, 2013 states in §18 that the dam is 34 feet high (consistent with the contour lines shown in figure 3).

On May 15, 2013, Robert A. Clay, P.E., Chief Engineer Dam and Reservoir Safety Program for DNR, wrote a letter stating that he was on site May 9, 2013 as a result of yet another complaint made to DNR by Petitioners. He measured the height of the dam and surveyed it with an automatic Sokkia level. He determined the height at less than 35 feet (33.5 feet). This measurement was virtually the same as that made by Aqua Terra prior to the April 19, 2013. Applicant submits that the maximum dam height<sup>4</sup> was not over 35 feet at its critical point and this is confirmed by at least two different professional engineers who took measurements.

This allegation of Petitioners appears to be founded on petitioner Snyder's "... believing the AA Quarry dam ... violated the 35-foot height" (page 9, Petitioners' brief) and Mr. Snyder's (apparently) reporting to the DNR that the dam height exceeded 35 feet. Petitioners have not offered any engineering measurements taken of the dam, where they were taken, when they were taken, the equipment utilized, the precise location of the measurement points at the top and bottom of the dam and whether the measurements were taken by a qualified professional engineer or surveyor or Mr. Snyder while trespassing on Applicant's land.

No such information or measurements has been offered to the DNR to date nor are any specific facts stated in the allegations in Petitioners' brief. Applicant is left with an unfounded

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<sup>4</sup> "Dam Height" means the difference in elevation of either the natural stream bed of the other stream or watercourse, or the lowest point on the toe of the dam and the dam crest elevation. 10 C.S.R. 22-1.020(24). Only Jurisdictional Dams greater than 35 feet in height require permits for construction. §236.400(5) R.S.Mo. and §236.440 R.S.Mo.

allegation that Petitioners believe the dam height was too high and that it was lowered without a DNR permit from the dam safety program.

Moreover, the profile of the dam top is uneven such that the top elevation on one end of the dam may exceed 35 feet while the elevation on the other end of the dam is under 35 feet. For purposes of the dam safety program, the measurements for the height of the dam are taken at the lowest point where water will spill over the top (dam crest elevation). And, even if the dam height exceeded 35 feet by some margin, Applicant had a good faith belief based on engineering evidence of Aqua Terra that the maximum relevant dam height was less than 35 feet tall.

This allegation of noncompliance is irrelevant, cannot support a claim that it suggests a reasonable likelihood of future acts of noncompliance; did not occur within five years prior to its application, and resulted in no harm to the environment or any individual. There are no DNR citations of noncompliance of record. Once again, Petitioners' allegation of a noncompliant event is unsupported by competent scientific evidence and, therefore, Applicant denies this allegation.

- F. Petitioners assert that Applicant dumped soil at the heel of the dam and that such soil washed away in a rain in violation of 10 C.S.R. 40-10.050(4)(B) and Dam Safety Program Requirements.

Applicant denies this allegation.

First, this anticipated mining operation was under construction pursuant to DNR permit application. Again, Petitioners quote from 40-10.050(4)(B) of the DNR regulations regarding "performance requirements" for the operation of a surface mine. Surface mining operations have not yet commenced on this property and, therefore, 10 C.S.R. 40-10.050(4)(B) does not apply here.

Second, the Missouri Dam Safety Program does not address storm water pollution management.

Third, Applicant has not been cited on the record by the Environmental Protection Agency, the Corps of Engineers or the DNR for any activities remotely connected to this allegation of Petitioners. It remains an unfounded and unsupported allegation, even in the brief.

Fourth, it is difficult to discern any details or specific information from Petitioners' allegations in the brief as to where and when the stated events occurred and how they were recorded for the record. Applicant does know that in early 2013 there was little or no rain at the location in January through most of May. However, at the end of May and end of June, the site experienced significant rainfalls with 4.77 inches falling in three days in May and 5.43 inches falling in four days in June.

Fifth, there is no allegation that this alleged activity resulted in harm to any person or the environment.

Absent further specific fact allegations from the Petitioners, Applicant denies this allegation.

#### **IV. HEALTH, SAFETY, LIVELIHOOD ISSUES**

- A. Petitioners assert that issuance of a land reclamation permit to Applicant for operations of a surface mine will unduly impair Petitioners' health, safety and livelihood.

Applicant denies this allegation generally and, further, denies it specifically as to the grounds asserted by Petitioners in their pleading/brief.

§444.773.4, R.S.Mo., provides:

"In any public hearing, if the Commission finds based on competent and substantial scientific evidence on the record that an interested party's health, safety or livelihood will be unduly impaired by the issuance of the permit, the Commission may deny such permit."

*See also* 10 C.S.R. 40-10.080.3(D) expressing the same burden upon the Petitioners in substantially similar language.

There are three important takeaways from both the statute and regulation where identical language coincides:

(a) Petitioner must introduce both competent and substantial scientific evidence on the record to support the claim of impairment.<sup>5</sup>

(b) Such evidence must demonstrate undue impairment to Petitioners' health, safety and livelihood; and

(c) The commission retains the discretion to grant or deny the permit even in the face of such evidence presented.

Stated another way:

(a) Petitioners are obligated to bring forth evidence which is not only adequate, suitable, sufficient and duly qualified to support their propositions, but also such evidence cannot be in the nature of mere subjective complaint. The evidence to support the proposition advanced must be objective and capable of demonstration in a controlled environment. Mere speculation, supposition or unfounded opinion will not suffice.

(b) The asserted impairment to health, safety and livelihood must be "*undue*"; that is, excessive, exceeding or violating propriety, unwarranted, inappropriate, unjustifiable, improper, illegal, hardship, burdensome, disproportionate, unreasonable, or any of the other myriad of definitions of the term "*undue*" which can be found in both legal and nonlegal dictionaries. Evidence of mere annoyance, nuisance or dislike of Applicant's activities will not suffice unless scientific evidence is brought forth objectively demonstrating at the hearing in a duly qualified way a nexus between the Applicant's operation of the quarry and an excessive, unreasonable and disproportionate impact upon Petitioners' health and welfare.

In addition to these requirements, 10 C.S.R. 40-10.080(2)(B) provides yet a third qualification to the Petitioners' proposed burden of evidence. A petitioner is said to have

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<sup>5</sup> "Competent" equals duly qualified, answering all requirements, adequate, suitable, sufficient, capable, legally fit (*Black's Law Dictionary*); "competent evidence" equals that which the very nature of the thing to be proven requires, as the production of a writing where its content are the subject of inquiry (*Black's Law Dictionary*); "substantial evidence" adequate evidence that is used to support an act or an omission has occurred; "scientific evidence" the testing of a hypothesis or a theory that is objective and in a controlled environment.

*standing* for a formal hearing if he or she demonstrates the permit may unduly impact health, safety and livelihood, but more specifically, however, that:

"The impact to the Petitioners' health, safety and livelihood *must be within the authority* of any environmental law or regulation administered by *the Missouri Department of Natural Resources*."

As stated by Kevin Mohammadi in his April 2, 2013 memorandum to the Land Reclamation Commission recommending issuance of the permit to the Applicant:

"The Land Reclamation Act addresses the issues of a request for public meeting, dust related issues as well as water quality and mining in established mine plan boundaries. The Department *does not have jurisdiction*<sup>6</sup> to address concerns related to road safety, blasting, noise, property devaluation or the natural beauty of the area." Kevin Mohammadi Memo, page 2.

In discussing a formal hearing for the Petitioners, Mr. Mohammadi said:

"The impact to the Petitioners' health, safety and livelihood must be within the authority of any environmental law or regulation administered by the Department of Natural Resources." Memorandum, page 4.

*See also* DNR web site FAQ's; Publication 2191, page 6, "*Truck traffic* is not an activity that is regulated by the Missouri Department of Natural Resources" and page 8 stating the same as to *noise*.

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<sup>6</sup> Subject matter jurisdiction is a tribunal's statutory authority to hear a particular kind of claim. *In re Marriage of Hendrix*, 183 S.W.3d 582 [6] (Mo. 2006); when it engages in the exercise of a special statutory power, the tribunal is confined strictly to the authority given by statute, *Missouri Soybean Assoc. v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo. 2003); scope of power and duties of a public agency is narrowly limited to those which are essential to accomplish the purpose for which the agency is created, *Board of Education, City of St. Louis v. State*, 47 S.W.3d 366 (Mo. 2001); agency adjudicative authority is not plenary and extends only to the ascertainment of facts and the application of existing law in order to resolve issues within the given area of agency expertise, *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo. 1982); an agency without subject matter jurisdiction can take no action other than to dismiss the claims. *St. Charles Ambulance District Inc. v. Missouri Department of Health and Senior Services*, 248 S.W.3d 52 (Mo.App. 2008).

Therefore, it appears that the Department of Natural Resources Land Reclamation Commission staff follows the plain language of the regulation and interprets it as written<sup>7</sup>.

Petitioners' burden here is to allege and present competent substantial scientific evidence of undue impairment to health, safety and livelihood as to undue impairments caused by concerns within the authority of the Missouri Department of Natural Resources to administer, *including* air, water and land reclamation; *but not* roads, blasting, noise, vibration, property values and general aesthetics.<sup>8</sup>

The Petitioners lack standing to contest issues outside of DNR jurisdiction as they have no valid right, title or interest in the subject matter of roads, blasting, noise, vibration, and property value in this proceeding. DNR has no authority to remedy petitioners' complaints on those matters. The land reclamation law does not provide a vehicle to restrict use of the highways or blasting. Applicant may engage such activities independent of any land reclamation permit.

No evidence is found in the Land Reclamation Act of a legislative purpose to confer such benefits upon Petitioners through the DNR permitting process. The stated goal of the Land Reclamation Act is, among others, to:

". . . strike a balance between surface mining of minerals and reclamation of land subjected to surface disturbances . . . and . . . to protect and promote health safety and the general welfare of the people of the State." *See* Land Reclamation Act Declaration of Policy at §444.762, R.S.Mo.

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<sup>7</sup> *See State ex rel Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916 (Mo.App. 1922); *Willard v. Red Lobster*, 926 S.W.2d 550 (Mo.App. 1996); *Morton v. Missouri Air Conservation Commission*, 944 S.W.2d 231 (Mo.App. 1977) considerable deference to agency is in order when reasonable interpretation of its own regulation is at issue.

<sup>8</sup> *See also* 7/1/13 DNR publication issued under names of Jay M. Nixon, Governor, and Sara Parker Pauley, Director, stating that issues regarding blasting, public safety on roads and mines effect on property values are ". . . outside the regulatory authority provided by the program through the Land Reclamation Act."

The Act is to balance state needs for the mining of minerals through surface mining operations while as far as practicable minimizing the adverse effects on the public and the environment. To carry out that practical purpose the General Assembly adopted an elaborate permitting system found in §§444.770 through 444.773 as reflected also in the state regulations found in 10 C.S.R. 40-10.020 - 10.040.

The regulations expressly provide and clarify how this practical balancing is to take place by allowing the Petitioners to contest permit applications where they suffer undue impacts to their health, safety and livelihood; but all within the laws and regulations administered by the DNR. The permitting statutes and regulations do not regulate road traffic, blasting, noise, vibrations and real estate valuations; but instead regulate and attempt to ameliorate any adverse consequences of the surface mining itself within the jurisdiction of the DNR (i.e., air, water and land).

The personal interests that Petitioners seek to safeguard and ameliorate (the alleged effects of roads, blasting, etc.) are not interests of those directly affected by the consequences of surface mining within the authority of the Land Reclamation Act. As such, the Land Reclamation Commission has no subject matter jurisdiction over matters which are not within the declared policy of the Land Reclamation Act and, therefore, complaints regarding such matters are to be dismissed with prejudice.

- B. Petitioners assert that Applicant's trucks traveling on AA Highway will unduly impair their health, safety and livelihood; and increase state maintenance costs.

Applicant denies this allegation.

First, this allegation involves laws and regulations not within the administrative jurisdiction of the Missouri Department of Natural Resources and, therefore, should be dismissed with prejudice.

Second, AA Highway is a public thoroughfare maintained by the State of Missouri through the Missouri Department of Transportation for the use and benefit of all taxpayers who may use the highways so long as they obey all applicable laws. The Petitioners in this case wish DNR to impose a restriction on highway use upon public traffic which is not imposed by the State of Missouri or any agency of the State including the Missouri Department of Transportation. Petitioners wish DNR Land Reclamation Commission to impose these restrictions without any statutory jurisdiction or authority.

Third, Petitioners' complaints and allegations are supposition and speculation regarding AA Highway's ability to handle traffic and are not supported by any statement of the existence of competent scientific and substantial evidence of the fact of impairment or that any particular individual would be "unduly" impaired by normal highway traffic. In fact, MoDot advised Petitioners at the public meeting that AA Highway was designed to handle the AA Quarry traffic.

- C. Petitioners assert that Applicant will unduly impair their livelihood by decreasing property values.

Applicant denies this allegation.

First, this allegation involves laws and regulations not within the administration of the Missouri Department of Natural Resources and, therefore, should be dismissed with prejudice.

Second, Petitioners have not put forth any competent substantial scientific evidence in their brief in support of this proposition.

Third, the DNR staff in the Land Reclamation Program contacted the Johnson County Tax Assessor, who advised the DNR that property values near the other four quarries in the county have not decreased.

- D. Petitioners assert that Applicant's operation of a quarry will result in only minimal sales tax revenue and another quarry is not needed.

Applicant denies this allegation. See (C) (1) and (2) above.

- E. Miscellaneous individual complaints of blasting, noise, vibration, traffic and dust.

Petitioners make certain additional individual complaints regarding the above.

- (a) Edward Earls (blasting, noise, traffic) (family member)
- (b) William Gard (blasting, noise, vibrations) (personal)
- (c) James and Susan Richards (blasting, noise, traffic) (horses)
- (d) Lori Adams (blasting and noise) (business) (Solutions 4 Fund Raising)
- (e) Tim and Leanne Stamm (blasting, noise and vibration) (business) (Chiropractor/Alliance of Divine Love)
- (f) Darren and Misty Cutright (dust and noise) (business) (M&D Motor Sports)

Applicant denies these allegations and that such impacts "unduly impair" the health, safety and livelihood of the individuals named as required by both statute and regulation. The complaints are subjective regarding expected future activities that Petitioners anticipate may possibly impact or inconvenience them in some way; but do not rise to the level of being excessive, disproportionate or unreasonable. These complaints are simply effects that the operation of a stone quarry might have on neighboring landowners. The DNR acts as a gatekeeper to assure that air quality, air emissions, water quality and land reclamation meet all applicable laws and regulations to ameliorate these effects. The Land Reclamation Act does not state that the Land Reclamation Commission is to assure itself of the elimination of all effects of surface mining as a fundamental predicate to the issuance of a permit.

The principal individual complaints regarding truck traffic, blasting, noise, vibration and property devaluation are administered by other state agencies which have not expressed the need to restrict any of Applicant's activities in regard to these matters.

Moreover, Applicant is permitted to run trucks upon AA Highway without opening a quarry at all. If Applicant simply chooses to run trucks on AA Highway, it could do so without any restriction and without opening a quarry with a land reclamation permit. The same is true for blasting which might create noise and vibration. Applicant may blast under Missouri law regardless of whether it operates a quarry under permit from the DNR for crushing and sizing purposes and commercial sale of product to the public. The Applicant may blast within the boundaries of its land for personal use and farm purposes, so long as Applicant obeys the Missouri blasting laws. Truck traffic and blasting and their effects on property values or property owners are entirely independent of quarry operations and the land reclamation permitting process. Clearly, this is the reason for 10 C.S.R. 40-10.080(2)(B) limiting the Land Reclamation Commission's jurisdiction in this regard to impacts on health, safety and livelihood ". . . *within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources.*" The DNR simply cannot restrict truck traffic to and from a site or blasting at a site and, therefore, acknowledges that limitation in the permitting regulations for purposes of notifying prospective petitioners.

Petitioners' individual complaints regarding truck traffic, noise, blasting, blasting effects, including noise and vibration, and the effect upon adjoining real estate values, neatly fit within the qualification language of 10 C.S.R. 40-10.080(2)(B) that the undue impact upon petitioners must be within the authority of laws administered by the DNR. Petitioners cannot compel the Commission to legally restrict Applicant's truck traffic and blasting. Thus, truck traffic, blasting noise vibration and property devaluation are not relevant for purposes of a land reclamation permit application and such claims should be dismissed with prejudice.

## CONCLUSION

The declared policy of the State of Missouri's Land Reclamation Act is not to "eliminate" all effects of surface mining operations upon the interests of the people of this State; but instead is to "strike a balance" between the two! Thus the statutory and regulatory requirements that the Petitioners' health, safety and livelihood must be "*unduly impaired*". 444.773.3 and .4 and 10 C.S.R. 40-080(2)(B)(3)(D). Both the statute and the regulation express the underlying understanding of the legislature that impairment upon neighboring landowners is inevitable from a quarry operation. Therefore, only "*undue*" impairment from impacts relative to laws administered by the DNR will result in the Commission denying an Applicant's permit.

Petitioner's petition should be dismissed with prejudice to future filing and a recommendation made to the Commission for approval of Applicant's pending permit application.

Respectfully submitted,

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Certification of Service

I hereby certify a copy of foregoing has been sent via email this 9th day of September, 2013, to:

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